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MICHAEL RODAK, JR.,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 918

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

APPELLANTS' REPLY BRIEF

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I. The First Amendment provides the press with protection for newsgathering in order to fulfill the community's constitutionally protected right to receive information.

Appellees seem to be arguing that the First Amendment protects only the "freedom to publish," Appellees' Brief 8, and not the right to gather news. They also contend that the First Amendment does not grant the press "access to a source of information which is not freely open to *all* citizens." Appellees' Brief 6 (emphasis added).

As this Court has made clear, however, the First Amendment grants constitutional protection to more than a right to publish—it recognizes a democratic community's need and right to receive information. *Stanley v. Georgia,* 394 U.S. 577, 564 (1969); *Kleindienst v. Mandel,* 408 U.S. 753, 762-65 (1972). To satisfy this need, the Founding Fathers explicitly singled out and listed the press as one of the preferred interests entitled to the high degree of protection afforded by the First Amendment. And this protection must include newsgathering, or else "freedom of the press would be eviscerated." *Branzburg v. Hayes,* 408 U.S. 664, 681 (1972).

It is for this reason that the press has rights and responsibilities with respect to newsgathering that the general public does not. It would obviously be a good thing if all citizens were ready, willing, and able to ferret out and circulate information of public importance, especially about public institutions. But this is not possible. Only the press has the commitment and the resources to perform that function. This is why, as noted above and in Appellants' Brief at pp. 9, 13-15, 28, the Constitution and the framers of the Bill of Rights explicitly singled out the press as the beneficiary of constitutional protection.

Defendant Park acknowledged as much in his homely illustration: "Where the president of the local Ladies' Aid Society can inform only a few in her group, the media can inform millions of citizens about prison programs." *On Being Medium Nice to Prisoners,* [1973] Wash. U. L. Q. 607, 615. Defendants similarly acknowledged this in the efforts that they have in fact made to provide the press with some "added consideration . . . by assisting them in gathering news. . . ." Appellees' Brief 14-15, 23. Other

public and private institutions make similar special arrangements to facilitate the press's newsgathering function, as described in Appellants' Brief 14-15.

Administrative devices for separating "newsmen" from "non-newsmen" may indeed create some administrative problems, but numerous penal systems, including California before August 21, 1971, and after the interim decree, A. 62-66, 123-25, seem to have managed to handle these, apparently without too much difficulty. For example, California and other jurisdictions issue press passes for many purposes, see A. 123-24, without running afoul of the Constitution.

II. Appellees have discriminated against the press-appellants by denying them the access to specific named inmates that appellees allow many others.

The Court need not, however, decide in this case whether the press's special newsgathering responsibilities imply a special right of access unavailable to other private citizens, for numerous other such citizens do have access to specific named inmates. The narrower question before the Court, therefore, is whether such differentiation is constitutional.

Appellees claim that simply "as members of the general public [appellants] have not been subjected to unlawful discrimination." Appellees' Brief 12. This is purportedly because the denial of a "benefit" is allegedly not absolute, access is allegedly not completely closed off, and appellees claim no constitutional right is involved. The only question is whether there is a "rational" basis for excluding newsmen, and since defendants say they acted for purposes of administrative convenience, rehabilitation and security, the denial of access is said to be rational.

It seems clear, however, that some members of "the general public" do have access to specific named inmates. *Id.* at 22. Moreover, both this Court and others have found that face-to-face contact with the specific people who have the desired information is indispensable to the full exercise of First Amendment rights. *Kleindienst v. Mandel*, 408 U. S. at 765; see cases cited in Appellants' Brief 20, 7, including the decision of the court below on the inmates' rights issue.[1] After all, if an inmate has important information, what is the value of random access tours where the chances of the press encountering that inmate are very, very low? And since the First Amendment is implicated, compare *Cruz v. Beto*, 405 U. S. 319 (1972), much more than a "rational basis" for the differentiation is required, even though a prison is involved.[2]

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[1] This should be contrasted with the Court's finding in *McDonald v. Board of Elections*, 394 U.S. 802, 807 (1969), cited at Appellees' Brief 14, that "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." Compare also *Goosby v. Osser*, 409 U.S. 512 (1973) and *O'Brien v. Skinner*, ____ U.S. ____, 38 L.Ed.2d 702, 707 (Jan. 16, 1972).

[2] Almost every circuit that has passed on the question has insisted on a stringent standard for judging the actions of prison officials which encroach upon First Amendment freedoms, especially where we deal not with a prisoner's right to express himself but with the community's right to receive information. See, *e.g.*, *Nolan v. Fitzpatrick*, 451 F.2d 545, 548-49 (1st Cir. 1971); *Goodwin v. Oswald*, 462 F.2d 1237 (2nd Cir. 1972); *Long v. Parker*, 390 F.2d 816, 822 (3d Cir. 1968), but see *O'Malley v. Brierly*, 477 F.2d 785, 796 (3d Cir. 197) (religious visit); *Brown v. Peyton*, 437 F.2d 1228; 1232 (4th Cir. 1971); *Walker v. Blackwell*, 411 F.2d 23, 28-29 (5th Cir. 1969); *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb.), *aff'd*, 452 F.2d 1005 (8th Cir. 1971); *cf. Morales v. Schmidt*, ____ F.2d ____, 72-1373 (7th Cir. 3/22/74) (*en banc*) (mail); *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971); *Hoggro v. Pontesso*, 456 F.2d 917, 919 (10th Cir. 1972); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969) (Muslim food);

We thus have differentiation among benefits afforded different groups, which, since it results in a heavy burden on the exercise of First Amendment rights, must be justified under a strict standard. The district court rejected as baseless all the justifications offered by appellees where the inmates' First Amendment rights of expression were concerned, and it is difficult to see how there can be a different result where the First Amendment right to gather news is involved. Indeed, Judge Hamlin concluded as to the inmates' rights that even the minimal "rational basis" test was not satisfied by appellees' justification, see Appendix to Appellants' Brief 48, and that conclusion applies equally to the press rights.

Respectfully submitted.

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